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No. 82-1477

ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE
COMPANY and GRAHAM BEACH PARTNERS,
Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI,
and EDUARDO E. MALAPIT, in his capacity as
MAYOR OF THE COUNTY OF KAUAI,
Appellees,

**BRIEF OF THE STATE OF HAWAII AMICUS
CURIAE IN SUPPORT OF APPELLANTS**

TANY S. HONG
Attorney General of Hawaii
JAMES H. DANNENBERG
Deputy Attorney General of Hawaii
(Counsel of Record)
Department of The Attorney General
Hawaii State Capitol
Honolulu, Hawaii 96813
(808) 548-4740
Attorneys for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE

The State of Hawaii, by Tany S. Hong, Attorney General, and James H. Dannenberg, Deputy Attorney General, submits this amicus curiae brief in support of the Appellants in the above-entitled cause, pursuant to Rule 36.4 of the Rules of the Supreme Court.

This case raises important constitutional issues arising out of the retroactive downzoning of a particular piece of property through a referendum. It also raises important questions of public policy since it is axiomatic that the restrictions on private property rights profoundly affect the nature and quality of the economic life of the State. To the extent that land use decisions unnecessarily impair

the rights of individual owners, the state economy may be adversely affected.

Because the general interests of the people of the State of Hawaii are at stake in the resolution of issues before this Court, your amicus believes that it has a substantial interest in the ultimate decision. For that reason, your amicus respectfully urges that the Court note probable jurisdiction, or, in the alternative, that it grant the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Retroactive downzoning by referendum of a single parcel under the circumstances of this case is both unconstitutional and violative of the principles of rational land use planning; in addition, the approval of such retroactive downzoning by the Hawaii Supreme Court poses a significant threat to the economy of the State of Hawaii in that potential investors will be unable to predict the extent to which legislative and executive approvals of development will withstand subsequent referenda directed at those particular developments.

ARGUMENT

I. Appellants' Constitutional Rights Under The Due Process And The Taking Clauses Were Violated By The Retroactive Downzoning Of Their Property.

Your amicus has carefully read and endorses the analysis of both the facts and constitutional issues contained in Appellants' Jurisdictional Statement. At the same time, however, the Hawaii Supreme Court's reliance on this Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) merits additional discussion.

The concept of zoning by referendum has been controversial in both law and land use planning. See, e.g. D. Callies, "The Supreme Court is Wrong About Referendum Zoning," 42 *Planning* 4 (Dec. 1976), Williams; *Am. Land Plan.* § 26.10 (Supp. 1982); and G. Goulder, "Referendum Zoning: *City of Eastlake v. Forest City Enterprises, Inc.*" 14 *Urban Law Annual* 319 (1977). While this Court has allowed the use of zoning by referendum it has also noted the potential for abuse of constitutional rights.

The Hawaii Supreme Court purports to adopt the *Eastlake* view in *Kauai v. Pacific Standard Life Insurance Co. et al.* (Slip Op. 8267, October 14, 1982), (hereinafter "Nukolii") but it does so with a curious selectivity. While referendum zoning is hailed as "a basic instrument of democratic government" Slip Op. at 8, citing *Eastlake* at 679, the Hawaii court apparently ignored the factual distinctions between the cases as well as the important warnings in the majority opinion about the possible unconstitutional uses and results of a referendum zoning system.

Eastlake is perhaps most clearly distinguishable because *all* zoning changes in that case had to be put to the electorate. It was not a case, as we face here, of an individual parcel being singled out for adverse action. A second important point is that the referendum in *Eastlake* had to be held within a very short period of time. Under the Hawaii ruling it could be delayed as much as two years.

It is important to note that the majority opinion in *Eastlake* specifically said that it did not face the precise question raised in the Nukolii case, for in *Eastlake* the property owner sought to upgrade zoning:

The situation presented in this case is not one of a zoning action denigrating the use or depreciating the

value of land; instead, it involves an effort [by the property owner] to *change* a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council.

426 U.S. at 680, n. 13 (Emphasis in original.)

II. The State's Interests Are Impaired By The Hawaii Supreme Court's Decision.

Traditionally, Hawaii has been a capital short State which relies heavily upon the infusion of capital from other areas of the world. Investors found Hawaii to be an attractive investment because of our controlled growth and a stable economy. For example, out of 56,502 hotel rooms in the state as of July, 1981, 10,333 (or 18.3 percent) were foreign owned; in addition, Hawaii ranks second among the states in percentage of foreign owned agricultural land. *State of Hawaii Data Book* pp. 559-568. These same investors now are unable to rely upon the clear and unambiguous language of any statute since the Supreme Court has rendered meaningless the zoning decisions of local legislative bodies, as well as the statutes dealing with zoning referenda. Effectively, the meaning of any such statute may be placed in doubt.

The specific effect of the decision is to abort in mid-stream construction on a single parcel of property which had commenced after valid building permits and other governmental approvals had been properly obtained (and condominium sales had been made and closed). The Hawaii Supreme Court determined that once a referendum petition was certified—here, by 20% of Kauai's 1978 eligible voters—all land use could be frozen; a landowner could only proceed at its peril in developing its land for the use for which it was zoned, even though the zoning on their parcel had not actually been changed but only *might* change. The impact of this decision goes beyond the De-

velopers' \$48 million investment; your amicus believes it will have a chilling effect on all future investment in Hawaii with accompanying adverse consequences on Hawaii's economy and an adverse impact on numerous state laws and policies.

Land-use policy and planning is comprehensively codified in Hawaii on both the state and local levels. *See, e.g.*, Hawaii Rev. Stat. ch. 205, 205A and 226. There are three distinct levels of planning and zoning. The first is the State Land Use Commission classification; the second is the County General Plan, and the third is specific County zoning. The state scheme of land-use regulation essentially provides for land-use designation on the state and local level, each to be consistent with the other. Specifically, the County General Plans must be consistent with and conform to the State Land Use classification. The specific County zoning, in turn, must be consistent with and conform to the County General Plan. As noted, prior to commencement of construction, the Developers were required to obtain approvals and consents from numerous state and local agencies. For the Developers, this was a more than two-year process which began as early as May, 1978 (when the Developers applied for zoning of the Nukolii site as "Resort District RR-20"), and culminated on November 3, 1980 (when the hotel building permit, which had been applied for three months earlier, was issued).

The impact of the Supreme Court's decision has already been felt. In the very few months that have elapsed since the decision was announced, major lending institutions have altered their lending policies to secure themselves against what they regard as a threat to the stability of their investment in the State. The new policies require developers to provide collateral totally independent of

the planned project to secure the construction loan. Only the largest developers can comply and then only at significant additional cost. The smaller developers, many of whom were born and raised in Hawaii, will be unable to post the newly-required additional collateral. They will therefore be unable to acquire construction financing, and, as a result, will be forced out of the local development business.

The reasons for the lenders' new policy is evident. In the past, based in part on earlier Supreme Court decisions, vesting of rights to zoning could be ascertained with relative certainty. However, as a result of this decision, a developer cannot be certain that his rights to the zoning of his property have vested. In a condominium project, for example, a developer could secure all required approvals and permits, begin construction and sell the project, only to find that vesting has not occurred. Thus, his lender could find itself in a situation where funds have been advanced in reliance upon the security of a viable project, and because of a retroactive down zoning now sanctioned by the Supreme Court, will no longer have adequate security for its loan.

Likewise, potential future developers looking at Hawaii for investment may not be willing to invest the time, effort and money to obtain the complicated layers of required permits. As has become evident, the interjection of *ad hoc* rezoning by referendum into the permit process is a substantial deterrent to future investment in Hawaii. The result of all this can only exacerbate the depressed state of Hawaii's tourism and construction industries, as well as the level of unemployment on Kauai specifically and in the State of Hawaii generally.

Even if a contemplated use of land is not subject to this prolonged permit process, any landowner may still be

stopped in its tracks in developing its land by the simple means of a minority of voters signing a petition to rezone the owner's—and only the owner's—parcel. The uncertainty and unsettling effects from such an arbitrary and capricious deprivation of land-use can only undermine development in Hawaii. This is a real possibility since the counties of Hawaii and Maui also have charters with referendum and/or initiative provisions applicable to zoning ordinances. Hawaii Charter, § 11; Maui Charter, § 11. The Hawaii Supreme Court decision has a direct impact on those provisions. Out-of-state investors can only assume that this highly publicized decision will apply statewide to the other counties as well. Indeed, on Oahu, developers are now being advised by Honolulu's corporation counsel that the recently amended Honolulu County Charter also permits legislation by initiative that would revoke existing zoning, even though Honolulu's charter does not expressly contain a referendum provision. Honolulu Charter, § 3.

III. The Decision Of The Hawaii Supreme Court Conflicts With State Goals And Policies.

The impact on Hawaii's economy is compounded by the fact that the decision invalidates state law and policy expressed by the Hawaii legislature.

In enacting, for example, the Hawaii State Planning Act of 1978, Hawaii Rev. Stat. ch. 226 (1982 Supp.) ("Hawaii State Plan"), the Hawaii legislature found, among other things, that: ". . . there is a need . . . to improve coordination among different agencies and levels of government, to provide for the wise use of Hawaii's resources and to guide the future development of the State." Hawaii Rev. Stat. § 226-1.

The *ad hoc*, selective and particularized rezoning, aimed only at a specific parcel of land, effected by the referendum and condoned by the Hawaii Supreme Court is the very antithesis of a comprehensive scheme of land-use planning and is wholly contrary to the goals and objectives of state-wide coordinated land-use planning enacted by the Hawaii legislature. Indeed, the rezoning violated not only the Hawaii Revised Statutes but the Kauai County Charter, both of which mandate that zoning ordinances must be consistent with the County General Plan, Charter, § 14.10; Hawaii Rev. Stat. § 46-4.

The economic impact of the decision is also contrary to the economic objectives of the Hawaii State Plan, which include, among other things, promotion of Hawaii as an "attractive market for investment," achievement of a "sustained level of construction activity," and encouragement of businesses that have "favorable financial multiplier effects" on the Hawaiian economy. Hawaii Rev. Stat. § 226-8(b) (2), (6), (14). See also Hawaii Rev. Stat. § 226-8(a), which states that state planning should be "directed towards achievement" of a "visitor industry" as a "major component of steady growth for Hawaii's economy." These planning goals and objectives were ignored and, indeed, jeopardized by the decision.

The failure of the Hawaii Supreme Court to discuss or deal with the economic objectives set forth above tipped the balance entirely against development in this State. In the permit application process complied with by the Developers, precisely such a balancing between the benefits of development and the need for open space use was done by the numerous state and local agencies and elected officials involved and was resolved in favor of development at Nukolii. Indeed, the Special Management Area ("SMA") permit process set out in Hawaii Revised Stat-

utes Chapter 205A was exactly the forum for weighing the benefits of the project against its impact on the scenic assets of the State, and in that forum the project was found to be consistent with State and County objectives. The effect of the decision is to disregard the judgment of such officials charged with the responsibility for a co-ordinated scheme of land-use planning mandated by the Hawaii legislature.

Much land use and economic planning are focused on the tourist industry. This is a vital part of Hawaii's economy which provided in 1981 \$446 million in tax revenues and accounted for 32.5% of the civilian workforce. *State Data Book*, pp. 184, 273. Hawaii is seeking not simply to continue to develop the tourist industry but as it is, to direct it away from Oahu to the other islands—such as Kauai. This is intended to serve two functions: first, by reducing the concentration of visitor activity it is believed that some of its negative effects can be mitigated. The second, and most important function, is to provide more jobs on the other islands.

Governor Ariyoshi has summarized the social dilemma very well:

We need to discourage the continued concentration of population on Oahu by providing the right kinds of housing, jobs and economy for our Neighbor Islanders and their offspring. . . . What I am talking about is the opportunity for a person who grows up on the Neighbor Islands to begin to feel that they have a right and they have a chance to live on the Neighbor Islands. It hurts me very much when I hear a young person saying that they are moving to Honolulu, or have moved to Oahu, not because they wanted to but because they felt there were no job opportunities on each of the Neighbor Islands. This is what we are talking about when we speak of the equal opportunities that we now have for education,

health services, social services, and we ought to have for employment opportunities also.

State of the State Address, 9th Leg., *Senate Journal* 46 (January 25, 1977)

IV. The Decision Of The Hawaii Supreme Court Amounts To Retroactive Application Of The 1980 Referendum.

Because the downzoning of the Nukolii site was effected by referendum, the Hawaii Supreme Court viewed the case presented as "one of first impression" that involved "a conflict between the private interest of the landowners" and "the public interest of the electorate to effectively determine what the land use policy shall be." However, by the time of the referendum, government consents had been given, building permits had already been issued, and construction had already begun on the Nukolii site. Precisely to mitigate the possible retroactive effects of a referendum, Section 5.11 of the Charter provided that the referendum process could not affect any "vested rights" or "any action taken or expenditure made up to the date of the referendum." Thus, the Developers, proceeded in reliance upon and in conformity with this provision, as well as the foregoing approvals and permits given by State and local officials and the above-described decisions of the County Council, the County Attorney and the Fifth Circuit. The literal and plain meaning of the "grandfather clause" contained in Section 5.11 is consistent with State law in this regard, which also precludes retroactive effect on any repeal or enactment of a State law. See Hawaii Rev. Stat. §§ 1-3, 1-19. In order to halt development on the Nukolii site, the Hawaii Supreme Court had to "reject the literal interpretation" of Section 5.11 of the Charter. Slip Op. at 10. However, the Court's refusal to adopt such a "literal" interpretation of Section 5.11 has created the situation whereby not only the De-

velopers' \$48 million investment is jeopardized, but has also cast substantial doubt as to future investment in Hawaii.

V. The Decision Of The Hawaii Supreme Court Diminishes The Level Of Predictability In Law Necessary To Facilitate Economic Decision Making

Regardless of the economic impact on the State of Hawaii, however, this Court should reverse the Hawaii Supreme Court because its decision casts doubt on the predictability of the legal system as it impacts upon the marketplace.

To the extent that Western legal systems have distinguished themselves from other systems of social and economic control, it is on the basis of what Max Weber called "formal rationality:" decisionmaking based upon articulable principles derived from characteristically "legal" tradition. See e.g., Rheinstein, *Max Weber on Law in Economy and Society* (1954). More important, these legal principles have historically given rise to a high degree of predictability of outcomes in Western law. If stability exists in any measure in our institutions, it is in part because our legal system provides a reliable and relatively predictable forum in which disputes may be resolved. If, for example, potential investors are forced to "guess" the meaning of otherwise unambiguous statutes drafted to protect their vested interests, fewer persons will be willing to make investments over a period of time.

This is precisely the message of the Nukolii decision. The developers obtained all required permits, invested considerable capital, and obtained favorable decisions from the Kauai County Council, the Kauai Corporation Counsel, and the Circuit Court. Nevertheless, the Hawaii Supreme Court chose to overturn these decisions

and rule retroactively that no rights had vested. It would have been difficult to predict such a result, and it is because of this unsettling effect that your amicus supports the position of Appellants.

CONCLUSION

For the foregoing reasons, your amicus, the State of Hawaii, respectfully urges that this Court note probable jurisdiction or, in the alternative, grant the Petition for Writ of Certiorari.

Respectfully submitted,

TANY S. HONG

Attorney General State of Hawaii

JAMES H. DANNENBERG

Deputy Attorney General

(Counsel of Record)

Hawaii State Capitol

Honolulu, Hawaii 96813

Telephone No. (808) 548-4740

Attorneys for Amicus Curiae

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